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 8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA  
 10 SAN FRANCISCO DIVISION

12 OVERTURE SERVICES, INC.,  
 13 Plaintiff and Counterdefendant,  
 14 v.  
 15 GOOGLE INC.,  
 16 Defendant and Counterclaimant.

Case No. C 02-01991 JSW (EDL)

**GOOGLE'S MISCELLANEOUS  
 ADMINISTRATIVE REQUEST RE:  
 OVERTURE'S REVISED CLAIM  
 CONSTRUCTIONS AND [PROPOSED]  
 ORDER**

**[Local Civil Rule 7-10]**

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**REQUEST**

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2 Pursuant to Civil Local Rules 7-10(b) and 7-3(d), or in the alternative pursuant to Civil  
3 Local Rules 7-10(a) and 7-3(d), Google hereby seeks leave to file a sur-reply in connection with  
4 Overture's very recent revisions of its proposed constructions for "search listing" and "search  
5 result list." Google's sur-reply would be limited to addressing those revised terms and be no  
6 more than five pages, due seven days after Overture's reply brief. Overture has refused to  
7 stipulate to Google's proposed sur-reply.

8 The basis for Google's request is Overture's extreme delay in revising its constructions of  
9 these claim terms. Overture has had many months to consider Google's fully briefed objections  
10 in Google's responsive claim construction brief filed in August 2003, but only 10 days ago gave  
11 notice of its revisions. *See* Declaration of Christine P. Sun In Support of Miscellaneous  
12 Administrative Request, ¶ 2. Even worse is that Overture's notice failed to provide any support  
13 for its revisions, leaving Google only to guess at what Overture's arguments might be in its reply  
14 brief.

15 A prime example of Overture's lack of candidness, and the ambiguity resulting  
16 therefrom, is its revision of "search result list." Overture has changed its proposed construction  
17 of this term from "a *set* of search listings that is obtained by calculation" to "a *series* of search  
18 listings than is obtained as a consequence of the examination of data." Google's proposed  
19 construction is: "the *series* of entries, selected from the database being searched by a searcher,  
20 *arranged one after the other*, containing the information responsive to the searcher's search."  
21 Overture has explained, without more, that its replacement of "set" to "series" moots Google's  
22 objections. *Id.* at ¶ 5, Exh.C.

23 But Google, in addition to its concerns about the word "set," also objected to Overture's  
24 prior definition to the extent that it did not make clear that a search result list is an *ordered* series  
25 of search listings. As Overture has not expressly adopted Google's proposed language of  
26 "arranged one after the other," it remains unclear if Overture has conceded that a search result is  
27 not only a "series of entries," but also an *ordered* series of listings. The upshot is that Google  
28 has been forced to use its limited space in its responsive brief to address a dispute that may not

1 exist. More importantly, to the extent that Overture argues that a “search result list” is a series of  
2 listings, but one which need not be *ordered*, Google has little clue what Overture’s support for  
3 that interpretation might be.

4 Similarly, Overture contends that it has replaced “calculation” with “the examination of  
5 data” to “add clarity to Overture’s proposed construction to search result list,” without any  
6 further explanation or any citations to intrinsic or extrinsic evidence that support its new  
7 definition. *See* Sun Decl., Exh. A. Absent the opportunity to review and consider Overture’s  
8 *fully briefed* arguments and evidence in support of its revisions, Google will not have a fair shot  
9 at responding to Overture’s proposed definitions in its one filing permitted under the current  
10 briefing schedule.

11 In sum, while Overture is correct that this Court’s Patent Standing Order discourages but  
12 does not prohibit a party from revising its proposed claim construction after the filing of the Joint  
13 Claim Construction Statement, Overture should not be allowed to gain tactical advantage by its  
14 lack of diligence in considering and responding to Google’s arguments. Moreover, Overture is  
15 wrong when it claims that Google will have the opportunity to respond to its revisions. As  
16 shown above, Overture has provided no argument or evidence in support of its revised  
17 constructions or even attempted to explain to Google what its revisions mean. Whether  
18 Overture’s circumspection is intentional or not, the result is that unless Google is permitted to  
19 file a sur-reply, Google will not in fact have the ability to address the *merits* of Overture’s  
20 revisions. Finally, the Court should grant Google’s request because the sur-reply would have no  
21 effect on the schedule for this case, as the claim construction hearing and tutorial are set to occur  
22 in March, 2004.

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1 For the reasons stated above, Google respectfully requests that the Court grants its  
2 request for leave to file a sur-reply.

3 Dated: January 30, 2004

KEKER & VAN NEST, LLP

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By:           /s/ Christine P. Sun            
CHRISTINE P. SUN  
Attorneys for Defendant and  
Counterclaimant GOOGLE INC.

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**[PROPOSED] ORDER**

The Court has considered the January 30, 2004 miscellaneous administrative request by Google Inc. (“Google”) for an order permitting leave to file a sur-reply to Overture Services, Inc.’s claim construction reply brief.

Good cause appearing, the Court GRANTS the Google’s request. Google is permitted to file a sur-reply limited to the terms “search listing” and “search result list” of no more than five pages. The sur-reply must be filed no later than February 20, 2004.

IT IS SO ORDERED.

Dated:

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HON. JEFFREY S. WHITE  
United States District Judge